The MVRA and Other Recent Bases of Expanding Restitution
Or: "Waiter, What's a *Tort* Doing in my (Sentencing) Soup!?"[1]

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I. Background

A well known jurist has noted that Black's Law Dictionary defines restitution as an "[a]ct of restoring ... anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification."[3] The long history of the payment for wrongs is, although largely civil in nature, also closely intertwined with concepts of punishment and justice; early forms of restitution, such as the law of Moses, required fourfold restitution for stolen sheep and fivefold for the more useful ox.[4] In England, there were elaborate and detailed systems of victim compensation in the Middle Ages, but with the ascension of the reign of kings, the state began to be treated as the "victim" of criminal offenses, and crimes came to be thought of as offenses against society rather than against the individual.[5] Just as criminal law as we know it developed from early civil law concepts, it has brought with it at least one aspect of civil compensation to victims, i.e., restitution. Currently, "[t]he United States is in a state of transition on restitution,"[6] and restitution is increasingly becoming part of modern criminal jurisprudence.

Undoubtedly Congress has intended, beginning in 1982, that as many victims be compensated as possible, and legislative provisions on restitution illustrate, "... a history marked by ... constant

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[1]"The backstroke" - was the answer comedian Henny Youngman quipped in response to the proverbial question about a fly in one's soup. To the extent that new restitution terminology takes courts "back" to familiar tort-territory in determining restitution, the backstroke is an apt response.

[2]The opinions and analysis herein are those of the author and do not represent a formal opinion of the Judicial Conference or of the General Counsel's Office for the Administrative Office of the Courts.

[3]U.S. v. Ferranti, 928 F.Supp. 206 (E.D.N.Y. 1996) (J. Weinstein), *aff'd sub nom* U.S. v. Tocco, 135 F.3d 116 (2d Cir. 1998), *cert denied*, Ferranti v. U.S., 523 U.S. 1096 (1998) (citing *Black's Law Dictionary*, 1477 (4th ed. 1968).

[4]Id. 928 F.Supp. at 220.

[5]Id. at 221.

[6]Id. at 219. See also, Garvey, "Punishment as Atonement," 46 USLALR 1801, n. 71 (1999), noting that "23 states mandate restitution generally, 24 require it as a condition of probation or parole, and 14 require it under other circumstances, such as when a suspended sentence is imposed or the inmate participates in a work-release program," (citing Sarnoff, "Paying for Crime: The Policies and Possibilities of Crime victim reimbursement," 17-18 (1996)).

expansion of the restitution remedy."[7] In 1982, Congress passed the Victim Witness Protection Act (VWPA),[8] now codified at 18 U.S.C. §§ 3663-3664,[9] which dramatically changed the character of restitution in federal criminal cases over its previous supervision-condition status under the FPA. In 1990, when the Supreme Court limited restitution to the count of conviction, Congress quickly responded by amending the VWPA to confirm that, where the offense involves a scheme, conspiracy, or pattern of criminal activity, restitution is authorized for the entire scheme.[10]

Congress further expanded restitution in 1994 by enacting § 3663(b)(4), which authorizes restitution for a victim's costs in participating in the investigation and prosecution of the case. This authorization uniquely compensates victims' costs in addition to harm caused by the core offense conduct. Also in 1994, Congress began the recent expansion in restitution statutory terminology by enacting four specific title 18 restitution statutes that mandated full restitution for harms *"proximately resulting"* from the offense, and for the *"full amount of the victim's loss."*[11]

The most sweeping change made to federal criminal restitution since 1982 came in 1996 when Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA).[12] The MVRA created § 3663A, which mandates full restitution for all violent offenses, title 18 property offenses, and consumer tampering offenses. (For so-called "mandatory" restitution, the court "shall" impose restitution for the full amount of the victims' harms caused by the offense, without consideration of the defendant's ability to pay.[13]) The MVRA also potentially broadened the definition of "victim" for both discretionary and (the new) mandatory restitution by defining a "victim" of the offense as a "person directly *and*

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[7]U.S. v. Martin, 128 F.3d 1188, 1196 (7th Cir. 1997); see also, U.S. v. Malpeso, 943 F.Supp. 254 (E.D.N.Y. 1996) (J. Weinstein), at 257 (citing the VWPA and U.S. v. Ferranti, 928 F.Supp. 206, 217-19, 220-221 (E.D.N.Y. 1996), discussing in detail the history of restitution and relating the role of pecuniary penalties in the French system and its increasing acceptance in the United States system).

[8]Pub. L. No. 97-291, 96 Stat. 1248 (1982), originally codified at §§ 3579, 3580.

[9]All section cites hereafter, if not otherwise noted, are from title 18 of the United States Code.

[10]§ 3663(a). "Scheme" hereinafter refers to the statutory, "scheme, conspiracy, or pattern of criminal activity," in §§ 3663(a) and 3663A(a).

[11]The four "specific" mandatory restitution statutes are: § 2248, for sexual abuse offenses (§§ 2241-2245); § 2259, for sexual exploitation of children offenses (§§ 2251-2258); §2264, for domestic violence offenses (§§ 2261-2262); and §2327, for telemarketing offenses (§§ 1028-1029 and 1341-1345) (hereinafter "specific title 18 mandatory restitution statutes"). The Child Support Recovery Act (§ 228), also passed in 1994, also mandates full "restitution," but the restitution is the amount owed under a child support order, and not subject to the same analysis as other restitution orders.

[12]Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, effective April 24, 1996.

[13]See the specific mandatory restitution statutes noted above, and § 3663A(a)(1).

proximately harmed as a result of the commission of an offense."[14] The MVRA also ventured into new territory by authorizing the first restitution for offenses for which there are no identifiable victims, with so-called "community restitution" for certain drug offenses.[15]

The MVRA is gradually changing the restitution landscape in federal criminal law. As courts begin to interpret its provisions, they are generally concluding that the effect of the MVRA was to provide an "expansive and powerful remedy."[16] While this trend bodes well for the victims of crimes, and is no doubt good public policy, the legislative changes, and especially the new tort-like terminology introduced in 1994 and used again in the MVRA, raises new and interesting issues borrowed from other areas of criminal and civil law. It also provides a potential basis for a reasoned expansion of the restitution concept. Although the determination of restitution is statutorily based, and can be broken down into analytical steps,[17] there is room for movement in the "grey area," either to expand or restrict the interpretation of what is authorized as restitution. The most "fluid" points in the analysis, which have produced the most litigation, are the determination of the scope of the offense of conviction (i.e. the identification of victims and, to some extent, the determination of harms). This often amounts to a determination of "causation" - what harms were "caused" by the offense.

The new MVRA terms have provided a tort-like framework within which restitution harms might be analyzed by raising implications of the common tort causation standard of "proximate cause." Although this raises new issues, it may also be helpful, both because it is a familiar concept to jurists and practitioners, and because no previous standard for causation was specified in the restitution statutes, or in the sentencing guidelines' definition of economic "loss."[18]

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[14]See § 3663A(a)(2) for mandatory restitution and § 3663(a)(2) for discretionary restitution.

[15]§ 3663(c); U.S.S.G. §5E1.1(d).

[16]U.S. v. Minneman, 143 F.3d 274, 284 (7th Cir. 1998) (citing U.S. v. Martin, 128 F.3d 1188, 1190-93 (7th Cir. 1997) (holding that the expanded fact-finding procedures for restitution indicates Congress intended that courts determine difficult issues such as the amount of tax owing for restitution, for conspiracy to violate the tax laws).

[17]See, "The Imposition of Restitution in Federal Criminal Cases," Goodwin, Federal Probation, Vol. 62, No. 2, December 1998, pp. 95-108, introducing the 5-step analysis of determining victims and harms for restitution: 1) Determine whether restitution is mandatory or discretionary; 2) Identify the victims of the offense of conviction; 3) Determine the harms suffered by the victims from the offense of conviction; 4) Determine which of those harms (and any additional costs) are compensable as restitution; and 5) Determine if the plea agreement permits broader restitution to be imposed. The steps have been widely trained with probation officers and are reportedly helpful.

[18]See, e.g., the lament of this lack in U.S. v. Neadle, 72 F.3d 1104 (3rd Cir. 1995).

II. The MVRA Provisions

The statutory language defining victims of schemes was unchanged by the MVRA. Both pre- and post-MVRA, a victim in such cases was defined as, "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Therefore, not surprisingly, the few courts that have had the occasion have decided that the MVRA did not make a significant difference in determining the scope or existence of a scheme.[19]

a) "directly and proximately"

However, for non-scheme offenses in the primary restitution statutes that authorize discretionary or mandatory restitution (§§ 3663 and 3663A), the MVRA provided an expanded definition of *"victim of such offense,"* namely, *"a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered..."* [20] While some recent opinions have recited these terms in upholding broad restitution orders,[21] none have directly analyzed the effect of these terms, to date. But this phraseology, due both to its invocation of tort law implications (discussed below), and to the similar terms introduced in the 1994 broad, mandatory title 18 restitution statutes, may ultimately have the effect of broadening restitution under the general statutes, as well.

b) "full amount of the victim's losses"

Moreover, the MVRA added a provision that presumably applies to all restitution orders that is also a re-appearance of strong language authorizing broad restitution under the special title 18 mandatory restitution statutes. The MVRA added § 3664(f)(1)(A), which provides: *"In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court..."* Courts are beginning to notice this provision that might be used to authorize broad restitution orders.[22]

c) Cases applying the specific title 18 statutory language

As noted, both "proximately" and "full amount of the victim's losses" first appeared in 1994 in the specific title 18 mandatory restitution statutes (18 U.S.C. §§ 2248, 2259, 2264, and 2327). All

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[19] See, e.g., U.S. v. Akande,200 F.3d 136, 139 (3d Cir. 1999); U.S. v. Hughey, Hughey II), 147 F.3d 423 (5th Cir. 1998); and U.S. v. Mancillas, 172 F.3d 341 (5th Cir. 1999).

[20] §§ 3663(a) and 3663A(a) (emphasis added).

[21] For example, the Tenth Circuit, in U.S. v. Checora, 175 F.3d 782 (10th Cir. 1999), held that the minor surviving children of a manslaughter victim were victims "directly and proximately" harmed by the manslaughter offense, for restitution purposes.

[22] U.S. v. Rea, 69 F.3d 1111, 1114 (8th Cir. 1999).

four contain the phrase, "*full amount of each victim's losses,*" which are the "*proximate result of the offense.*"[23] Courts have imposed, and upheld, broad restitution orders for these offenses, based not only on the more-inclusive list of harms, but also on the "full amount of each victim's losses" and "proximate result" language.

For example, in U.S. v. Crandon, the Third Circuit upheld psychiatric care for the 14 year old victim molested by the defendant (who found the victim on the internet), as harm "proximately resulting" from the offense.[24] The court also noted the language in §2259 authorizing restitution for the "full amount of the victim's losses." The Ninth Circuit relied at least partially on the "full amount of the victim's losses" language in § 2259 to uphold restitution for *future* psychiatric counseling costs of the juvenile victim in U.S. v. Laney.[25] (See discussion of "future" harms, below.) The Second Circuit, in U.S. v. Hayes, upheld restitution for the victim's legal costs incurred prior to the defendant's interstate travel to violate her protection order, as costs "caused" by the offense conduct, relying in part on the "full amount" language in § 2264.[26]

d) "Proximate" Cause

As noted, there is no causation standard specified consistently in the guidelines, and there was none in the restitution statutes prior to the addition of the MVRA terms. The term "proximately" invokes to lawyers the familiar causation standard of "proximate cause" in tort law. "Proximate cause" refers to the legal causation standard for which a defendant is held civilly liable for injury to another person. The concept refers, at a minimum, to harms that would not have occurred "but for" the defendant's conduct (i.e. "factual" or "cause-in-fact" causation). However, because this wide scope of harms goes on, theoretically, forever, it is nearly always further restricted in one or more ways. Everyone might agree, for example, that an avalanche was ultimately (physically) caused by a hiker's dislodging of a stone, and that a village was wiped out by the avalanche, but the hiker would not ordinarily be held responsible for the harm to the village. However, it would not be impossible to imagine a scenario under which the hiker might be held liable, depending on the hiker's intent and knowledge.

Indeed, the most usual form of narrowing factual causation, which deals with the physical world, involves scrutiny of the defendant's state of mind. This restriction invokes not only practical

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[23]After the initial phrase, "full amount of each victim's losses," § 2327(b)(3) later adds "*all losses suffered by the victim as a proximate result of the offense.*" The other three special title 18 mandatory restitution statutes contain, after the initial phrase, a specific listing of compensable harms more inclusive than that in §§ 3663 and 3663A, along with the phrase, "*any other losses suffered by the victim as a proximate result of the offense.*"

[24]173 F.3d 122 (3d Cir. 1999).

[25]189 F.3d 954 (9th Cir. 1999).

[26]135 F.3d 133 (2d Cir. 1998).

concerns (it is impossible to hold everyone responsible for all the results of their actions), but also invokes social policy. Indeed, most arguments about causation in both civil and criminal law are less about whether the defendant's conduct is in a chain of events leading up to the harm, than they are about whether the defendant anticipated or should have anticipated the harm, i.e. was it foreseeable to the reasonable person in defendant's position?[27]

While the concept of "foreseeability" has been interpreted slightly differently for tort rather than contract law,[28] it is also a familiar legal concept in criminal law, as well, for both liability and sentencing purposes. Foreseeability is a component of the mental state required for crimes involving criminal negligence, recklessness, specific intent, or knowledge.[29] For example, a co-conspirator is liable for acts committed by other conspirators so long as the acts are within the scope of the conspiracy or are foreseeable consequences of the unlawful agreement.[30] At sentencing, the guidelines employ "foreseeability" to measure offense seriousness.[31]

As has been argued in favor of using a "reasonably foreseeable" causation standard in a reformed guideline definition of economic "loss" currently before the Commission, "The inclusion of foreseeable harms in the sentencing calculus is not only sanctioned by long precedent, it is entirely consistent with the fundamental principles and purposes of criminal sentencing. Again, criminal law is preeminently about fault. It is unjust to put someone in prison for harms he did not intend or that he could not reasonably have anticipated would follow from his choice to do wrong."[32] The same argument can be made for interpreting the new "proximate" restitution terminology as invoking not only a "but for" factual causation, but also a "reasonable foreseeability" component to causation for restitution purposes, as well.

Another way of narrowing the "cause-in-fact" harm caused by a defendant's conduct is to apply a "natural consequences" test (sometimes known as a "substantial factor" test) to all the harm that is within the "but for" scope of harm caused by the defendant's conduct. That is, rather than relying on "reasonable foreseeability" to restrict factual causation, this view would hold a defendant responsible for the harm for which the defendant's conduct was a "substantial factor." While both the "natural

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[27]For an excellent discussion of the proximate cause concept in criminal law, and its adaptation to the guideline "loss" context, see "Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines," Bowman, Vanderbilt L.Rev., Vol. 51, No. 3, April 1998, see pp.530-536.

[28]Id. at 532.

[29]Id. at 533-34.

[30]See, e.g., Pinkerton v. U.S., 328 U.S. 640, 647-48 (1946); U.S. v. Laurenzana, 113 F.3d 689, 693 (7th Cir. 1997).

[31]See, e.g., U.S.S.G. §1B1.3(a)(1)(B): relevant conduct includes harms that are reasonably foreseeable results of the defendant's jointly undertaken acts with others.

[32]Bowman, supra, at 535.

consequence" approach and the "reasonable foreseeability" approach are ways to limit "but for" causation, the "natural consequence" approach is the broader of the two.
The famous torts case of Palsgraf v. Long Island Railway Co., presents the two principle views of how cause-in-fact causation should be narrowed to become what is known as "proximate cause," i.e. what harms a defendant is to be held civilly liable for.[33] The majority opinion by Justice Cardozo focuses on whether the harm was "foreseeable" to someone in the defendant's position, whereas the minority opinion as persuasively contends that one should be responsible for all the "natural consequences" of one's acts, regardless of whether they were foreseeable or not.

e) Restitution causation

It is not yet clear to what extent the addition of the terms *"directly and proximately"* and *"proximately resulting"* to the restitution statutes may (or may not) result in a transfer of the "proximate cause" concept into restitution analysis. It is likely that, based on its context elsewhere, "proximately" may come to be interpreted as including harm that is not only factually caused by the defendant's conduct ("but for"), but which was also "reasonably foreseeable" to a reasonable person in defendant's position. The "natural consequences" view of proximate cause could also be applied to further narrow the standard, as has been suggested for the guidelines loss definition,[34] in which case the foreseeable harm must also have been a probable (or natural) result of the offense conduct.[35] Such a causation standard would be reasoned, consistent, familiar to judges and practitioners, and likely to produce fair results. Because there was no previous causation standard specified, such a standard might include more, or in some cases less, harm than if no causation standard is specified or applied. Thus it is probably more accurate to view the adoption of such a standard as a development of restitution law rather than an expansion or limitation of the restitution penalty, per se.

The results of applying such a causation standard might be most evident where the scope of the offense has previously been somewhat ambiguous, such as for those offenses that involve an intent to deceive or to defraud (e.g. possession of counterfeit instruments or stolen or unauthorized access devices), but which are not customarily alleged by the government by virtue of a detailed "scheme," in furtherance of which each count of conviction is alleged to have been committed (such as is the case with wire, mail, and bank fraud offenses). In addition, collateral (or indirect) harms from an offense, such as victims' expenses, might be more apt to be included under such a standard if they are found to be a foreseeable result of the offense conduct. For example, while pre-MVRA restitution could generally not be imposed for harms not directly caused by the offense conduct, such as the cost to a

[33] 162 N.E. 99 (N.Y. 1928).

[34] See Bowman at 535.

[35] Of course, there are additional restrictions that apply to restitution that do not apply to "loss" for sentencing purposes: only actual (as opposed to intended) loss is included, and only unrecovered loss is included.

bank fraud victim of reconstructing bank statements and replacing stolen funds,[36] courts may ultimately conclude that such harms are included in "proximate" harms from the offense.

Institutionally, the tort-like terminology may simply result in a closer analysis of the causation of harms, and not be either broader or narrower than previous analysis. The larger number of cases in which restitution is an issue, along with the introduction of these new issues may, as noted, change the pleading style of the government to better describe the contours of an offense for restitution purposes (which would also provide better notice to defendants and more certainty at sentencing). As a result of any or all of these factors, combined with the advent of "mandatory" restitution, restitution is likely to be more frequently, and perhaps more broadly, imposed by federal courts in criminal cases than in the past.

III. Other Restitution Rationales Worth Noting

Some recent cases appear to be developing the concept of restitution in other ways as well. These rationales, together with the causation standard discussed above, provide further assistance to courts in determining the extent of the restitution authorized. These cases have explored "future" harms, based on an MVRA provision, focused on conduct found to be "an integral part" of the offense for restitution purposes, and resurrected the traditional, fundamental concept underlying restitution, to "restore" the victim, to determine the value of destroyed property with rare, intrinsic value.

a) Ascertainable "Future" Harms

Future harms are conceptually included in the restitution determination, at least to the extent that they can be determined with sufficient specificity at sentencing. This principle is at least implied by the MVRA provision, § 3664(d)(5), that allows the court to increase the restitution amount based on newly discovered losses after sentencing under certain circumstances. It provides:

> *"[After sentencing,] [i]f the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief."*

The Ninth Circuit recently focused on this provision in U.S. v. Laney.[37] There the defendant was convicted of child pornography and of engaging in the sexual exploitation of a child. The court ordered the defendant to pay restitution to the child for present and future counseling expenses, and the

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[36] U.S. v. Schinnel, 80 F.3d 1064, 1070 (5th Cir. 1996).

[37] 189 F.3d 954 (9th Cir. 1999).

Ninth Circuit upheld the award. The court noted that compensable losses under § 2259 (the relevant specific mandatory restitution statute for child pornography offenses) specifically include costs of the victim's "medical services relating to physical, psychiatric, or psychological care."[38] It also reasoned that Congress must have intended a court to order restitution at sentencing for harm occurring post-sentencing, but which is ascertainable at sentencing, because § 3664(d)(5) only allows the court to order restitution for losses not "ascertainable" at the time of sentencing.

In Laney, the court heard expert testimony on the victim's need for 6 years of treatment, and found that the future cost to the victim was "ascertainable" at sentencing.[39] Further, the court noted that because the costs were ascertainable at sentencing, the victim might be foreclosed from pursuing the costs later under § 3664(d)(5). Finally, the court found that Congress would not have intended the "strangely unwieldy procedure" of requiring a victim to petition the court for an amended restitution order every 60 days for as long as the therapy lasted."[40] While part of the Laney opinion relies on the language in § 2259, much of its analysis is stated in broad enough terms to lend support to similar restitution awards for future harms in other kinds of cases, so long as the calculation of the future loss can be made with "reasonable certainty" at sentencing.

b) An "Integral Part" of the Offense

Prior cases on firearms have not allowed restitution for the victim of a shooting where the defendant was convicted of felon in possession of a firearms, since no element of the offense involved the shooting,[41] even though such a shooting victim can be a "victim" for guideline sentencing purposes.[42] However, the Tenth Circuit recently took a broad perspective of restitution in U.S. v. Smith,[43] where the offense of conviction was § 924(c), using a firearm during a crime of violence. The defendant admitted using the gun while robbing a credit union, from which he took $11,709, and was ordered to pay that amount in restitution. He appealed, arguing that the credit union was not a "victim" of the § 924(c) offense.

The court upheld the restitution on two grounds. First, the Information identified the credit

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[38] § 2259(b)(3)(B).

[39] Id. at 967, n. 14 (citing U.S. v. Fountain, 768 F.2d 790, 801-2 (7th Cir. 1985), reversing a restitution award, pre-MVRA, that compensated for a victim's lost future wages because of the uncertain nature of the calculation). The court also noted that in Laney, "the government's estimate of the amount was well-supported and exact, and ... Laney did not contest it."

[40] Id. at 966-67.

[41] See U.S. v. McArthur, 108 F.3d 1350 (11th Cir. 1997).

[42] See U.S. v. Kuban, 94 F.3d 971 (5th Cir. 1996).

[43] 182 F.3d 733 (10th Cir. 1999).

union as the victim of the charged offense and the defendant agreed "to make restitution" to the "victim of the offense charged," although the court noted such a non-specific agreement would not by itself have supported the restitution order. Second, and most importantly for this discussion, the court upheld the restitution because the victim's use of the gun during the robbery was "an integral part and cause of the injury and loss to the credit union."[44]

While it is true that the 924(c) offense specifies "use" of the gun in an underlying offense, which may have also provided support for the court's position in Smith, another sentencing court was reversed by the Fifth Circuit in U.S. v. Mancillas, for relying on the word "use" in the offense of conviction of possessing implements to manufacture counterfeit securities with the intent that the securities be used, to impose restitution for the defendant's use of the counterfeit securities on dates preceding the arrest date named in the indictment.[45] If the court had found the use of the securities to be an "integral part of the offense" of possessing implements for their manufacture (intending that they be so used), it may have made the difference with the appellate court on this very close issue.

C. "Restoring" the Victim

Reference to the fundamental purpose of restitution, to "restore" the victim to his or her pre-offense state, is sometimes helpful when determining what restitution should be imposed, especially where the value of the harm caused to the victim is not easily determined. This concept helps to exclude secondary or corollary losses to victims, and to focus on determining the value of what was lost to the victim *as a result of the offense*, from the victim's perspective. This is especially so to the extent that the court views the purpose of restitution as primarily to compensate victims rather than to punish defendants.[46]

For example, where a security camera was damaged in a robbery, the bank may not be able to recover the cost of a state-of-the-art system to replace the damaged one, even though, undisputedly, the bank would not have replaced the system or perhaps even have realized the need to upgrade it, "but for" the robbery. Rather, the true cost to the victim is probably that of a replacement of a similar system to that damaged. However, if an improved replacement were needed in order to meet current standards (from which the older, prior system was exempted), "restoring" the victim might reasonably be found to include the cost of whatever system is needed in order to make the replacement system operable for the victim in the same way the prior system was. Or, in the alternative, such a replacement cost might be found to be a "foreseeable" natural consequence of the defendant's offense conduct.

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[44]Id. at 736.

[45]172 F.3d 341 (5th Cir. 1999) (a post-MVRA case).

[46]See, e.g., the cases relying on this primary purpose to hold that restitution principles are not subject to the *ex post facto* constraint of the U.S. Constitution, such as, U.S. v. Newman, 144 F.3d 531 (7th Cir. 1998); U.S. v. Nichols , 169 F.3d 1255 (10th Cir. 1999).

A recent case that demonstrates that the application of the restorative purpose of restitution might be especially appropriate where the lost or damaged property has special intrinsic or historical value, is U.S. v. Shugart,[47] where the Eleventh Circuit upheld the sentencing court's imposition of restitution for the value of a 100-year-old church destroyed by arson, using the replacement cost of a near-identical church on the same site. The court concluded that this value came the closest to a "restoration" of as many of the values, memories, and benefits of the old church to its parishioners as possible. A comparable structure in another location would not restore as many of these attributes of the old church for the victims. The restitution was upheld, despite the fact that the replacement building would be a newly constructed one that would cost more than the purchase of an already-existing, comparable structure, and might cost more built on the same site rather than on another, less expensive site.

IV. Conclusion

As more and more cases that require mandatory restitution are being sentenced by federal courts, parties and courts are being increasingly forced to analyze the many issues involved with the determination of restitution. The five suggested steps, introduced in December 1998, to provide some assistance in the analysis of how much restitution can, or should, be imposed in mandatory restitution cases. In mandatory restitution cases, the full loss amount is imposed as restitution, but in discretionary restitution cases the loss is imposed only to the extent that the court finds the defendant has the future ability to pay, over the life of the obligation.[48] New terminology and provisions which invoke a "proximate" causation standard should ultimately be helpful to courts in making the necessary restitution determinations. These, along with a consideration of future harms, the integral part of the offense, and the restoration of the victim, may result in restitution orders that better compensate victims of crime to the greatest extent statutorily authorized for federal criminal cases.

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[47] 176 F.3d 1373 (11th Cir. 1999).

[48] See § 3663(a)(1)(B)(i).